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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 412

AUBRY WILLIAMS, PETITIONER,

vs.

STATE OF GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED JULY 9, 1954

CERTIORARI GRANTED OCTOBER 18, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 412

AUBRY WILLIAMS, PETITIONER,

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STATE OF GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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1-3 In Superior Court of Fulton County

THE STATE OF GEORGIA

v.

AUBRY WILLIAMS

No. 68,769

Indictment for Murder in Fulton Superior Court.

Verdict of Guilty, March Term, 1953,

Rendered on the 10th day of March, 1953.

EXTRAORDINARY MOTION FOR A NEW TRIAL

Comes now the defendant, Aubry Williams, at this November Term, 1953, of said Court, and moves the Court for a new trial, upon the following extraordinary grounds, to wit:

GROUND ONE. Because movant was, on his trial for the offense of murder, at the March Term, 1953, of Fulton Superior Court, denied the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (section 1-815, Code of 1933), which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Movant contends that the jury panel put upon him on his trial was not fairly and properly impaneled and was an illegal jury and ought not to have been put upon him. Movant avers that the jurors so put upon him were taken from the jury list of Fulton County, Georgia, which was prepared from the books of the Tax Receiver of Fulton County, Georgia, pursuant to the provisions of Section 50-106, Code of 1933, which provides:

"Biennially, or, if the judge of the Superior Court shall direct, triennially on the first Monday in August, or within 30 days thereafter the board of jury commissioners shall revise the jury lists.

4 "The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and

shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

Section 59-101, Code of 1933, provides: "There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor; Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners."

Under the foregoing statute, the Judge of the Superior Court is required to appoint six "discreet" persons to such board.

Article VI, Section XVI, Paragraph II of the Constitution of the State of Georgia (Section 2-5102, Code of 1933, Ann. Supp.) provides:

"The General Assembly shall provide by law for the selection of the most experienced, intelligent and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. Nevertheless, the grand jurors shall be competent to serve as traverse jurors. The General Assembly shall have the power to require jury service of women also, under such regulations as the General Assembly may prescribe."

Movant contends that the statutes codified as Sections 59-101 and 59-106, Code of 1933, while constitutional, have been applied in an unconstitutional manner by action of the authorities of the State of Georgia as to him because:

(a) Movant is a Negro;

(b) Movant was on trial for the murder of a white man.

(c) The statutes so codified made no provision for the appointment of a person of color as a jury commissioner and never in the history of Fulton County, Georgia, has a Negro been appointed to serve as a jury commissioner, and no member of the same race as defendant has ever been given the opportunity to determine the

qualifications of the persons whose names appear on the Tax Receiver's Digest from which said jury commissioners are required to select jurors;

(d) In selecting persons from the Tax Receiver's Digest for service as jurors, the names of persons so selected having been placed in the traverse jury box and constituting the names in the jury box from which the panel put upon movant on his trial were drawn, the jury commissioners of Fulton County acted upon information from the Atlanta City Directory, the Atlanta Telephone Directory, and personal knowledge of individual jury commissioners. Residents of certain areas in the City of Atlanta and Fulton County were considered by the jury commissioners as unsuitable for selection on account of the nature of such area as being populated by the poorer class of citizens, and rejected because residing in such areas. Negroes residing in and near the City of Atlanta, in Fulton County, live in well defined and well known areas not populated by white
6 people and Negroes are considered by white jury commissioners as of the poorer class of citizens and rejected as jurors because of their color and residence;

(e) The systematic exclusion of citizens of the colored race from the board of commissioners solely because of their race and color is discriminatory and a denial to movant of equal protection of law, in violation of the fourteenth amendment to the Constitution of the United States;

(f) The fact that no negro has ever been appointed as a commissioner in Fulton County, Georgia, is evidence of systematic exclusion of citizens of the colored race from duty as jury commissioners, solely because of their race and color.

Movant contends that the proportionate number of negro traverse jurors to white traverse jurors in the jury box has been excessively small, both in comparison with the proportionate number of negro citizens to white citizens in Fulton County as a whole and in proportion to the comparative number of negro citizens to white citizens on the Tax Receiver's Digest and that this fact is the result of a deliberate and systematic exclusion of proportionate numbers of the negro race from jury service and that such exclusion denies the movant equal protection of the laws, contrary to the above quoted provisions of the Constitution of the United States in that it designedly failed to afford him a proportionate number of citizens of his own race, and a fair selection thereof before whom his cause might be tried.

The names of persons of the white and negro races were placed in the traverse jury box from which the panel placed upon movant on his trial was drawn by the names of the white citizens being placed therein on white tickets, or slips of paper and the names

of the negro citizens placed therein on yellow colored tickets, or slips of paper.

The proportionate number of negro citizens to white citizens actually summoned on panels for jury duty is less, regularly
7 and systematically, than the proportionate number of negro citizens to white citizens on the list of traverse jurors as a whole, and as contained in the trave se jury box. By reason of the names of negro citizens in the jury box being written on yellow tickets, while the names of white jurors are printed on white tickets, the operations of the mathematical laws of chance may be defeated, and it is made possible to keep the number of negro petit jurors summoned for jury duty within the six peremptory challenges allowed to the State in any felony case, and well under the ten such allowed to the State on the trial of a capital felony indictment, so that counsel for the State may in every case where a negro is on trial absolutely assure that no negro will be sworn as a juror.

Movant contends that such application of the above quoted laws of the State of Georgia by the authorities of the State of Georgia and Fulton County, generally, and specifically to the panel of jurors put upon movant on his trial, denies to negroes, and denied to movant, the equal protection of the laws by retaining in the hands of those authorities the means of insuring that no negro ever serve on a jury sworn to try the cause of a member of the negro race, which means were exercised upon movant's trial as will appear herein.

Movant shows that in the reported case of Watkins v. State, 199 Ga. 81, public speeches of the Solicitor General of another county here referred to, showing that he by design exercised the State's peremptory challenges to prevent negro jurors from serving on the trial of any cause in his court, and that this means is known to and available to all solicitors general, and may be made effective by control of the number of negro petit jurors summoned for jury service.

Movant shows that on the 18th day of February, 1953, the Fulton County Traverse Jury Box contained white tickets bearing the names of white citizens, and yellow tickets bearing the names
8 of negro citizens, placed therein by the jury commissioners of Fulton County after being selected as traverse jurors in the manner stated.

His Honor, Jesse M. Wood, one of the Judges of the Superior Court of Fulton County, presiding during the January-February term, 1953, of Fulton Superior Court, on the 18th day of February, 1953, drew from one of the compartments of the traverse jury box some number of tickets in excess of 120, bearing names to serve

as petit jurors for the trial of civil and criminal cases in Fulton Superior Court during the week of March 9, 1953.

The tickets so drawn out by said Judge were placed in the hands of a deputy sheriff, who handed them to a deputy clerk for listing, and following listing, returned the tickets to the Judge, who placed them in the other compartment of the traverse jury box, all handling and listing occurring in the presence of the Judge. Said Judge did not personally verify the listing of names by the deputy clerk by comparison with the tickets, nor the total number of names on the list by a count of the tickets.

After the summoning of the petit jurors whose names appeared on the list, and after the excusing of some number thereon, there were organized 10 panels of 12 petit jurors for the trial of civil and criminal cases in Fulton Superior Court during the week of March 9, 1953, or a total of 120 jurors. Four of these jurors were negroes.

Movant was tried March 10, 1953.

Panels 6, 7, 8, 9, and 10, each of 12 petit jurors, were assigned to serve in the criminal division of said court, and all of the four negro petit jurors were included in these panels. No negro petit jurors were assigned to the civil division.

After a panel of 48 jurors, from those petit jurors assigned to serve in the criminal division, were put upon movant, and upon their voir dire, thirteen petit jurors so put upon movant
9 were set aside for cause, among them three of the four negro petit jurors, leaving one negro among the petit jurors empaneled and found competent to try movant.

This negro petit juror, whose name appeared four on the list of the panel of competent jurors as called over by the clerk, upon the calling of his name was challenged peremptorily by the State, being the first juror thus challenged by the State, leaving no negro petit jurors empaneled and competent to try movant.

Movant contends that the circumstances of the selection, drawing, summoning, organizing, empaneling, and challenging of the jury sworn to try movant, show that he was discriminated against at every stage and denied the equal protection of the laws, in violation of the provision of the Fourteenth Amendment to the Constitution of the United States, quoted above.

Movant avers that he was harmed by the deliberate exclusion as aforesaid of negroes from the jury which was sworn to try him for the offense of murder because:

(a) A member or members of his own race might have given due regard to movant's statement made on his trial wherein he denied any connection with the offense for which he was being tried;

(b) A member or members of his own race, had they voted to convict movant, might through understanding of movant's heredity

and environment, and of motivations among members of their race, have voted to recommend movant to the mercy of the court, and persuaded the jury to adopt their viewpoint, thus binding the court to pronounce a sentence of life imprisonment upon movant.

Movant avers that he and his counsel have exercised due diligence in presenting this motion for a new trial and this ground thereof, and movant attaches hereto as Exhibits "A", "B" and "C" to this ground his own affidavit and affidavits of his counsel setting forth the circumstances under which the facts herein set forth came to their attention.

Movant contends that by reason of the unconstitutional application as to him of the quoted laws of the State of Georgia, and of sections 59-108, 59-701, 50-801, and 59-802, Code of 1933 and the Ann. Supp. thereto, he should be granted a new trial.

Exhibit "A" to Motion for New Trial

(Ground One)

[Title omitted]

Affidavit

Now comes Aubry Williams, defendant in said case, and, being first duly sworn, on oath deposes and says that he makes this affidavit to accompany his extraordinary motion for a new trial based on constitutional grounds.

Deponent further says that he did not at the time of his trial in the Superior Court of Fulton County, Georgia, on March 10, 1953, under said indictment, have any knowledge of or information concerning the selection, drawing, organizing, and empaneling of the jury panel put upon him on his trial, but assumed that said jury was a legal jury.

Deponent further says that he knew of no facts affecting the legality of the jury panel, or of the jury sworn to try deponent prior to the swearing of said jury, nor since, until the date of the execution of this affidavit to accompany his extraordinary motion for a new trial complaining of the illegality of said jury panel put upon him.

Aubry Williams,
Defendant.

Duly sworn to. Jurat omitted in printing.

12 EXHIBIT "B" TO MOTION FOR NEW TRIAL

(Ground One)

[Title omitted]

AFFIDAVIT

Personally before the undersigned officer authorized to administer oaths comes Carter Goode, who being first duly sworn, on oath deposes and says that he is an attorney at law of the Atlanta, Georgia, bar, and was sole counsel for Aubry Williams on his trial for the offense of murder in the Superior Court of Fulton County, Georgia, on the 10th day of March, 1953, under indictment No. 68.769.

Deponent further says that he did not know of the facts set out in the first and second grounds of the extraordinary motion for a new trial of which this affidavit is a part before the trial and before the verdict in said case, and that the same could not have been discovered by him in the exercise of ordinary diligence.

Deponent further says that the defendant, Aubry Williams, denied committing the offense with which he was charged in the indictment, and deponent devoted his time and efforts to ascertaining the nature of the evidence to be presented by the State of Georgia upon the trial.

Deponent further says that he in good faith accepted the panel of jurors put upon defendant on said trial as being a lawful panel of jurors.

13 Deponent makes this affidavit to accompany the extraordinary motion for a new trial in said case, as a part of said motion.

CARTER GOODE

Duly sworn to. Jurat omitted in printing.

14 EXHIBIT "C" TO MOTION FOR NEW TRIAL

(Ground One)

[Title omitted]

AFFIDAVIT

Personally before the undersigned officer authorized to administer oaths comes Ellis M. Creel, who being first duly sworn, on oath deposes and says that he is an attorney at law of the Atlanta, Georgia, bar, practicing his profession in association with Carter Goode, Esquire, of said bar, under the firm name "Goode and Creel."

Deponent further says that the said Carter Goode, Esq., was

already counsel for Aubry Williams, whose trial under indictment No. 68,769, was pending in Fulton Superior Court, when his association with the said Carter Goode, Esquire, began in January, 1953.

Deponent further says that he did not participate in the preparation for the trial of said Williams, which took place on March 10, 1953, and had no knowledge of any of the details of the case nor of the nature or extent of the preparations, nor did deponent take any part in the trial.

Deponent further says that he has not acquainted himself with any of the facts, nor with the legal questions involved, has not been called upon to do so by said Williams or by the said Carter Goode, Esquire, and has had no knowledge concerning said case except generally of its status in the courts.

Deponent makes this affidavit to accompany the extraordinary motior for a new trial in said case, as a part of said motion.

ELLIS M. CREEL.

15 *Duly sworn to. Jurat omitted in printing.*

16 *Ground Two.* Because movant was, on his trial for the offense of murder, at the March Term, 1953, of Fulton Superior Court, and conviction, denied due process of law, in violation of Section I of the fourteenth amendment to the Constitution of the United States (Section 1-815, Code of 1933), which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Movant contends that the jury panel put upon him on his trial was not fairly and properly empaneled and was an illegal jury and ought not to have been put upon him. Movant avers that the jurors so put upon him were taken from the jury list of Fulton County, Georgia, which was prepared from the books of the Tax Receiver of Fulton County Georgia, pursuant to the provisions of Section 59-106, Code of 1933, which provides:

"Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

"The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall

select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body
17 of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

Section 59-101, Code of 1933, provides:

"There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointments for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor; Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners."

Under the foregoing statute, the Judge of the Superior Court is required to appoint six "discreet" persons to such board.

Article VI, Section XVI, Paragraph II of the Constitution of the State of Georgia (Section 2-5102, Code of 1933, Ann. Supp.) provides:

"The General Assembly shall provide by law for the selection of the most experienced, intelligent and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. Nevertheless, the grand jurors shall be competent to serve as traverse jurors. The General Assembly shall have the power to require jury service of women also, under such regulations as the General Assembly may prescribe."

Movant contends that the statutes codified as Sections 59-101 and 59-106, Code of 1933, while constitutional have been applied in an unconstitutional manner by action of the authorities
18 of the State of Georgia as to him because:

(a) Movant is a negro.

(b) Movant was on trial for the murder of a white man.

(c) The statutes so codified made no provision for the appointment of a person of color as a jury commissioner and never in the history of Fulton County, Georgia, has a negro been appointed to serve as a jury commissioner, and no member of the same race as defendant has ever been given the opportunity to determine the qualifications of the persons whose names appear on the Tax Re-

ceiver's Digest from which said jury commissioners are required to select jurors;

(d) In selecting persons from the Tax Receiver's Digest for service as jurors, the names of persons so selected having been placed in the traverse jury box and constituting the names in the jury box from which the panel put upon movant on his trial were drawn, the jury commissioners of Fulton County acted upon information from the Atlanta City Directory, the Atlanta Telephone Directory, and personal knowledge of individual jury commissioners. Residents of certain areas in the City of Atlanta and Fulton County were considered by the jury commissioners as unsuitable for selection on account of the nature of such area as being populated by the poorer class of citizens, and rejected because residing in such areas. Negroes residing in and near the City of Atlanta in Fulton County, live in well defined and well known areas not populated by white people and negroes are considered by white jury commissioners as of the poorer class of citizens and rejected as jurors because of their color and residence;

(e) The systematic exclusion of citizens of the colored race from the board of commissioners solely because of their race and color is discriminatory and a denial to movant of due process of law in violation of the fourteenth amendment to the Constitution of the United States;

(f) The fact that no negro has ever been appointed as a
19 commissioner in Fulton County, Georgia, is evidence of systematic exclusion of citizens of the colored race from duty as jury commissioners, solely because of their race and color.

Movant contends that the proportionate number of negro traverse jurors to white traverse jurors in the jury box has been excessively small, both in comparison with the proportionate number of negro citizens to white citizens in Fulton County as a whole and in proportion to the comparative number of negro citizens to white citizens on the Tax Receiver's Digest and that this fact is the result of a deliberate and systematic exclusion of proportionate numbers of the negro race from jury service and that such exclusion denied the movant due process of law contrary to the above quoted provisions of the Constitution of the United States in that it designedly failed to afford him a proportionate number of citizens of his own race, and a fair selection thereof before whom his cause might be tried.

The names of persons of the white and negro races were placed in the traverse jury box from which the panel placed upon movant on his trial was drawn by the names of the white citizens being placed therein on white tickets, or slips of paper and the names of the negro citizens placed thereon on yellow colored tickets, or slip of paper.

The proportionate number of negro citizens to white citizens actually summoned on panels for jury duty is less, regularly and systematically, than the proportionate number of negro citizens to white citizens on the list of traverse jurors as a whole, and as contained in the traverse jury box. By reason of the names of negro citizens in the jury box being written on yellow tickets, while the names of white jurors are printed on white tickets, the operations of the mathematical laws of chance may be defeated, and it is made possible to keep the number of negro petit jurors summoned for jury duty within the six peremptory challenges allowed to
20 the State in any felony case, and well under the ten such allowed to the State on the trial of a capital felony indictment, so that counsel for the State may in every case where a negro is on trial absolutely assure that no negro will be sworn as a juror.

Movant contends that such application of the above quoted laws of the State of Georgia by the authorities of the State of Georgia and Fulton County, generally, and specifically to the panel of jurors put upon movant on his trial, denies to negroes, and denied to movant due process of law by retaining in the hands of those authorities the means of insuring that no negro ever serve on a jury sworn to try the cause of a member of the negro race, which means were exercised upon movant's trial as will appear herein.

Movant shows that in the reported case of Watkins v. State, 199 Ga. 81, public speeches of the Solicitor General of another county were referred to, showing that he by design exercised the State's peremptory challenges to prevent negro jurors from serving on the trial of any cause in his court, and that this means is known to and available to all solicitors general, and may be made effective by control of the number of negro petit jurors summoned for jury service.

Movant shows that on the 18th day of February, 1953, the Fulton County Traverse Jury Box contained white tickets bearing the names of negro citizens, and yellow tickets bearing the names of negro citizens, placed therein by the jury commissioners of Fulton County after being selected as traverse jurors in the manner stated.

His Honor, Jesse M. Wood, one of the Judges of the Superior Court of Fulton County, presiding during the January-February term, 1953, of Fulton Superior Court, on the 18th day of February, 1953, drew from one of the compartments of the traverse jury box some number of tickets in excess of 120, bearing names to serve as petit jurors for the trial of civil and criminal cases in Fulton
21 Superior Court during the week of March 9, 1953.

The tickets as drawn out by said Judge were placed in the hands of a deputy sheriff, who handed them to a deputy clerk for listing, and following listing, returned the tickets to the Judge, who placed them in the other compartment of the traverse jury box, all

handling and listing occurring in the presence of the judge. Said Judge did not personally verify the listing of names by the deputy clerk by comparison with the tickets, nor the total number of names on the list by a count of the tickets.

After the summoning of the petit jurors whose names appeared on the list, and after the excusing of some number thereof, there were organized 10 panels of 12 petit jurors for the trial of civil and criminal cases in Fulton Superior Court during the week of March 9, 1953, or a total of 120 jurors. Four of these jurors were negroes.

Movant was tried March 10, 1953.

Panels 6, 7, 8, 9, and 10, each of 12 petit jurors, were assigned to serve in the criminal division of said court, and all of the 4 negro petit jurors were included in these panels. No negro petit jurors were assigned to the civil division.

After a panel of 48 jurors, from those petit jurors assigned to serve in the criminal division, were put upon movant, and upon their voir dire, 13 petit jurors so put upon movant were set aside for cause, among them 3 of the 4 negro petit jurors, leaving 1 negro among the petit jurors empaneled and found competent to try movant.

This negro petit juror, whose name appeared fourth on the list of the panel of competent jurors as called over by the clerk, upon the calling of his name was challenged peremptorily by the State, being the first juror thus challenged by the State, leaving no negro petit jurors empaneled and competent to try movant.

Movant contends that the circumstances of the selection, drawing, summoning, organizing, empaneling and challenging of the
22 jury sworn to try movant, show that he was discriminated against at every stage and denied the equal protection of the laws, in violation of the provision of the Fourteenth Amendment to the Constitution of the United States, quoted above.

Movant avers that he was harmed by the deliberate exclusion as aforesaid of negroes from the jury which was sworn to try him for the offense of murder because:

(a) A member or members of his own race might have given due regard to movant's statement made on his trial wherein he denied any connection with the offense for which he was being tried;

(b) A member or members of his own race, had they voted to convict movant, might through understanding of movant's heredity and environment, and of motivations among members of their race, have voted to recommend movant to the mercy of the court, and persuaded the jury to adopt their viewpoint, thus binding the court to pronounce a sentence of life imprisonment upon movant.

Movant avers that he and his counsel have exercised due diligence in presenting this motion for a new trial and this ground thereof,

and movant attaches hereto as Exhibits "A," "B," and "C," to this ground his own affidavit and affidavits of his council setting forth the circumstances under which the facts herein set forth came to their attention.

Movant contends that by reason of the unconstitutional application as to him of the quoted laws of the State of Georgia, and of Sections 59-108, 59-701, 59-801, and 59-802, Code of 1933, and the Ann. Supp. thereto, he should be granted a new trial.

Wherefore, movant prays that these, his extraordinary grounds for a new trial, be inquired of by the court, approved, and allowed, and that a new trial be granted him.

CARTER GOODE,
ELLIS M. CREEL,
Movant's Attorneys.

23 EXHIBIT "A" TO MOTION FOR NEW TRIAL

(Ground Two)

[Title omitted]

AFFIDAVIT

Now comes Aubry Williams, defendant in said case and, being first duly sworn, on oath deposes and says that he makes this affidavit to accompany his extraordinary motion for a new trial based on constitutional grounds.

Deponent further says that he did not at the time of his trial in the Superior Court of Fulton County, Georgia, on March 10, 1953, under said indictment, have any knowledge of or information concerning the selection, drawing, organizing, and empaneling of the jury panel put upon him on his trial, but assumed that said jury was a legal jury.

Deponent further says that he knew of no facts affecting the legality of the jury panel, or of the jury sworn to try deponent prior to the swearing of said jury, nor since, until the dates of the execution of this affidavit to accompany his extraordinary motion for a new trial complaining of the illegality of said jury panel put upon him.

AUBRY WILLIAMS,
Defendant.

Duly sworn to. Jurat omitted in printing.

24 EXHIBIT "B" TO MOTION FOR NEW TRIAL

[Title omitted]

AFFIDAVIT

Personally appeared before the undersigned officer authorized to administer oaths comes Carter Goode, who being first duly sworn, on oath deposes and says that he is an attorney at law of the Atlanta, Georgia, bar, and was sole counsel for Aubry Williams on his trial for the offense of murder in the Superior Court of Fulton County, Georgia, on the 10th day of March, 1953, under Indictment No. 68,769.

Deponent further says that he did not know of the facts set out in the first and second grounds of the extraordinary motion for a new trial of which this affidavit is a part before the trial and before the verdict in said case, and that the same could not have been discovered by him in the exercise of ordinary diligence.

Deponent further says that the defendant, Aubry Williams, denied committing the offense with which he was charged in the indictment, and deponent devoted his time and efforts to ascertaining the nature of the evidence to be presented by the State of Georgia upon the trial.

Deponent further says that he in good faith accepted the panel of jurors put upon the defendant on said trial as being a lawful panel of jurors.

Deponent makes this affidavit to accompany the extraordinary motion for a new trial in said case, as a part of said motion.

CARTER GOODE

25 *Duly sworn to. Jurat omitted in printing.*

26 EXHIBIT "C" TO MOTION FOR NEW TRIAL

[Title omitted]

AFFIDAVIT

Personally before the undersigned officer authorized to administer oaths comes Ellis M. Creel, who being first duly sworn, on oath deposes and says that he is an attorney at law of the Atlanta, Georgia, bar, practicing his profession in association with Carter Goode, Esquire, of said bar, under the firm name "Goode and Creel."

Deponent further says that the said Carter Goode, Esq., was already counsel for Aubry Williams, whose trial under indictment No. 68769, was pending in Fulton Superior Court, when his association with the said Carter Goode, Esquire, began in January, 1953.

Deponent further says that he did not participate in the preparation for the trial of said Williams, which took place on March 10, 1953, and had no knowledge of any of the details of the case nor of the nature or extent of the preparations, nor did deponent take any part in the trial.

Deponent further says that he has not acquainted himself with any of the facts, nor with the legal questions involved, has not been called upon to do so by said Aubry Williams or by the said Carter Goode, Esquire, and has had no knowledge concerning said case except generally of its status in the courts.

Deponent makes this affidavit to accompany the extraordinary motion for a new trial in said case, as a part of said motion.

ELLIS M. CREEL.

27 *Duly sworn to. Jurat omitted in printing.*

28 In Superior Court of Fulton County

[Title omitted]

ORDER TO SHOW CAUSE—Filed December 1, 1953

The within and foregoing extraordinary motion for a new trial having been presented, read and considered, it is ordered that the same be filed.

It is further ordered that the State of Georgia by Paul Webb, Sr., Solicitor General, Fulton Superior Court, Atlanta Judicial Circuit, show cause before me at 404 Fulton County Court House at 3:00 P. M., on the 21 day of December, 1953, why said motion should not be granted. Let evidence be presented upon the hearing by parole, affidavit, or documentary evidence.

It is further ordered that the State of Georgia be served with a copy of this motion, and order, by serving Paul Webb, Sr., Solicitor General, Fulton Superior Court, Atlanta Judicial Circuit, instanter; and that this order act as a supersedeas until the further order of the court.

This 1st day of Dec., 1953.

E. E. ANDREWS,
Judge Fulton Superior Court, Atlanta Judicial Circuit.

[File endorsement omitted.]

SERVICE OF MOTION AND ORDER (Omitted in printing)

29-32 In Superior Court of Fulton Coun'y

ORDER DISMISSING MOTION—Jan. 18, 1954

The above and foregoing extraordinary motion for new trial coming on regularly for hearing, and upon motion of the Solicitor General, the same is hereby dismissed for the reason that the grounds of the motion did not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion, that such motion is not [sic] good as an extraordinary motion and cannot be equally entertained as such.

E. E. ANDREWS,
Judge, S. C. A. C.

33 In Superior Court of Fulton County

BILL OF EXCEPTIONS—Filed Feb. 24, 1954

Be it remembered that on the 10th day of March, 1953, at the regular March term, 1953, of the Superior Court of Fulton County, before the Honorable E. E. Andrews, Judge, then and there presiding, there came on to be tried the case of the State of Georgia against Aubry Williams, the same being an indictment wherein the said Aubry Williams was charged with the offense of murder.

Be it further remembered that after evidence had been introduced and both sides had closed, the jury on the 10th day of March, 1953, returned a verdict finding the said Aubry Williams guilty of murder, without a recommendation of mercy.

Be it further remembered that said defendant in regular course and within the time prescribed by law filed his motion for a new trial, amended the same, excepted to the judgment by said the Honorable E. E. Andrews, Judge, overruling said motion for a new trial, and by writ of error to the Supreme Court of Georgia had a review of said judgment by said court in case No. 18,348, Williams v. The State, decided October 14, 1953.

Be it further remembered that the remittitur from the Supreme Court of Georgia was duly transmitted to the Clerk of Fulton Superior Court, and the judgment of the Supreme Court of Georgia affirming the said judgment overruling said motion for a new trial was made the judgment of Fulton Superior Court, and said defendant was on the 23rd day of November, 1953, sentenced to death by electrocution.

Be it further remembered that on the 1st day of December, 1953, during the regular November term, 1953, of the Superior Court of Fulton County, said defendant presented to the Honorable E. E. Andrews, Judge presiding as aforesaid, his extraordinary motion for a new trial, when and whereupon on said 1st day of December,

1953, said Judge made and entered his order as follows, omitting formal parts:

34 "The within and foregoing extraordinary motion for a new trial having been presented, read and considered, it is ordered that the same be filed.

"It is further ordered that the State of Georgia, by Paul Webb, Sr., Solicitor General, Fulton Superior Court, Atlanta Judicial Circuit, show cause before me at 404 Fulton County Court House at 3:00 p. m. on the 21 day of December, 1953, why said motion should not be granted. Let evidence be presented upon the hearing by parole, affidavit, or documentary evidence.

"It is further ordered that the State of Georgia be served with a copy of this motion, and order, by serving Paul Webb, Sr., Solicitor General, Fulton Superior Court, Atlanta Judicial Circuit, instanter; and that this order act as a supersedeas until the further order of the court.

"This 1st day of December, 1953."

Be it further remembered that the said extraordinary motion for a new trial was duly and regularly continued for hearing until the 18th day of January, 1954, when and whereupon on said 18th day of January, 1954, said judge made and entered his order and judgment dismissing said extraordinary motion for a new trial, as follows:

"The above and foregoing extraordinary motion for new trial coming on regularly for hearing, and upon motion of the Solicitor General, the same is hereby dismissed for the reason that the grounds of the motion do not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion, that such motion is not good as an extraordinary motion and can not be legally entertained as such.

"This the 18th day of Jan., 1954."

To which said order and judgment of the court dismissing said extraordinary motion for a new trial, the defendant, Aubry Williams, then and there excepted, now excepts, and assigns the same as error as being contrary to law.

35 Aubry Williams, defendant on the trial of said case and movant in said extraordinary motion for a new trial names himself as plaintiff in error in this his bill of exceptions, and names the State of Georgia as defendant in error.

And now comes plaintiff in error on this 15th day of February, 1954, and within the time prescribed by law presents to the Honorable E. E. Andrews, Judge as aforesaid, this his bill of exceptions, and asks that the same may be signed and certified in order that said case may be carried to the Supreme Court of Georgia,

in order that the errors herein alleged to have been committed may be considered and corrected.

Plaintiff in error specifies as material to a clear understanding of the errors complained of the following portions of the record, viz.:

1. The indictment, numbered 68,769, together with all entries thereon, with the plea of not guilty and the verdict of the jury entered thereon dated March 18, 1953.

2. The extraordinary motion for a new trial, and all ordered and entries thereon, with order dismissing said extraordinary motion for a new trial, dated January 18, 1954.

3. The sentence of the court, pronounced November 23, 1953.

The Supreme Court of Georgia has jurisdiction in this case of conviction of a capital felony. Constitution of the State of Georgia of 1945, Article VI, Section II, Paragraph IV (Code, Section 2-3704).

Plaintiff in error most respectfully submits this his bill of exceptions.

CARTER GOODE,
ELLIS M. CREEL,
Attorneys for Plaintiff in Error.

36 JUDGE'S CERTIFICATE

I do hereby certify that the foregoing bill of exceptions is true, and contains and specifies all of the record material to a clear understanding of the errors complained of, and the Clerk of the Superior Court of Fulton County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the next term of the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected.

I further certify that before certifying this bill of exceptions reasonable notice was given to counsel for the defendants in error, and opportunity afforded them to be heard on the question whether this bill of exceptions is correct and complete, and that said counsel were present at the signing of this certificate, or waived their presence.

Let the filing of the bill of exceptions and this certificate in the office of the Clerk of the Superior Court of Fulton County act as a supersedeas until the further order of the court.

This 15th day of February, 1954.

E. E. ANDREWS,
Judge, Fulton Superior Court,
Atlanta Judicial Circuit.

ACKNOWLEDGMENT OF SERVICE (Omitted in printing)

37

EXHIBIT

The within and foregoing bill of exceptions has been exhibited to me before presentation to the judge for certification, and I have examined the same and have no objection to the signing thereof. I waive my presence at the presentation and signing of the certificate on said bill of acceptance.

This 15th day of February, 1954.

PAUL WEBB, SR.,
Solicitor General,
Fulton Superior Court,
Atlanta Judicial Circuit.
By CHARLIE O. MURPHY,
Counsel for Defendant in Error.

38 In Superior Court of Fulton County

[Title omitted]

AFFIDAVIT OF POVERTY—Filed February 16, 1954

Personally appeared before the undersigned Aubry Williams, said defendant, who on oath says that he is unable from his poverty to pay the costs, and that he is advised by counsel that he had good cause for writ of error. Defendant makes this affidavit that supersedeas may issue.

AUBRY WILLIAMS,
Defendant.

Duly sworn to. Jurat omitted in printing.

[File endorsement omitted.]

39 Clerk's Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

40 In Supreme Court of Georgia

OPINION—May 19, 1954

By the Court:

There is no error in the judgment of the court below dismissing the extraordinary motion for new trial.

The plaintiff in error was tried and convicted of murder, without a recommendation of mercy, in the Superior Court of Fulton County on March 10, 1953. A motion for new trial was filed and duly overruled. That judgment was affirmed by this court. See Williams v. State, 210 Ga. 207.

On December 1, 1953, the plaintiff in error filed his extraordinary motion for new trial. This motion was set for hearing and duly continued until January 18, 1954. When the motion came on for a hearing, it was dismissed on motion of the solicitor-general. To this judgment the plaintiff in error excepted and assigns this judgment as error.

The extraordinary motion for new trial contains two grounds both complaining that the defendant had been denied certain specified constitutional rights guaranteed him under stated provisions of the Constitution of the United States. Ground two has been expressly abandoned, and will not be considered. Ground one contends that, upon the trial of the defendant for murder in the Superior Court of Fulton County, he was denied equal protection of the laws in violation of sec. 1 of the Fourteenth Amendment to the Constitution of the United States (Code § 1-815). This ground is long and sets out the process of selecting persons to serve as jury commissioners and persons to serve as jurors, and the empaneling of said jurors to serve in specific cases. The substance of the contention, however, that
41 the defendant was denied equal protection of the laws was that, in the selection, drawing, summoning, organizing, empaneling, and challenging of the jury sworn to try him, he was discriminated against on account of his color.

Many methods and instances of discrimination against the defendant are related in ground one of the extraordinary motion. However, it is urged in this court that the defendant is entitled to a new trial because of the fact that the names of white traverse jurors were placed on white paper and that the names of colored traverse jurors were placed on yellow paper. It is urged that this is discriminatory, and that this practice made it possible to keep the number of Negroes summoned for jury service within the number of peremptory challenges allowed the State and thus enabled the State to keep Negroes from serving on the jury.

It appears from the record that four Negroes were on the panel of 48 put upon the defendant. Three of these were excused for cause. The fourth was called for service by the clerk and was peremptorily challenged by the State, leaving no Negroes on the jury.

The other grounds of the motion need not be set out here, since they are not argued in this court. However, the decision here made will be decisive of all questions in the case, since all relate to the legality of the selection, drawing, summoning, organizing, and empaneling of the jury put upon the defendant.

42 WYATT, *Presiding Justice:* 1. The defendant is here attempting by extraordinary motion for new trial to challenge the legality of the jury put upon him in the instant case. He relies entirely upon the case of Avery v. State of Georgia, 345 U. S. 559

(73 S. Ct. 891), contending that this case is controlling in the instant case. We do not agree with this conclusion. In Avery v. State of Georgia, supra, the defendant, upon being arraigned for trial in Fulton County, filed a written challenge to the array of traverse jurors put upon him for reasons set out, among them that the names of white jurors were put upon white slips of paper and that the names of colored jurors were put upon yellow paper. See Avery v. State of Georgia, supra, and Avery v. State, 209 Ga. 116. In the instant case, no challenge to the array of traverse jurors was filed, and no question as to the legality of the jury was raised until after the denial of a motion for new trial had been affirmed by this court. See Williams v. State, 210 Ga. 207.

It is settled law in this State that, when a panel of jurors is put upon the prisoner, he should challenge the array for any cause which would go to show that it was not fairly and properly put upon him, and that if he fails to do so, the objection is waived and can not thereafter be made a ground of a motion for new trial. See Lumpkin v. State, 152 Ga. 229; Cornelius v. State, 193 Ga. 25; Cumming v. State, 155 Ga. 346; Moon v. State, 68 Ga. 687; and Williams v. State, 31 Ga. App. 17. In the instant case, the defendant made no objection to the jury when the panel was put upon him, and made no objection until he filed this extraordinary motion for new trial after a new trial had been denied and that judgment affirmed by this court. See Williams v. State, supra.

It follows, therefore, that the judgment of the court below dis-
43 missing the extraordinary motion for new trial was not error.

The defendant and his attorney state that they did not know of the facts set out in grounds one and two of the motion for new trial, and "that the same could not have been discovered by him in the exercise of ordinary diligence." This is not sufficient to excuse the defendant from the necessity of presenting his written challenge to the array of traverse jurors when the panel was put upon him. See, in this connection, Lumpkin v. State, supra; Cornelius v. State, supra; Redding v. State, 183 Ga. 704; Edge v. State, 200 Ga. 257. It follows, under the decisions of this court above cited, it was not error to dismiss the extraordinary motion for new trial.

2. There is a further reason why the motion in the instant case is not sufficient as an extraordinary motion for new trial. The affidavit of the defendant states in part: "The defendant did not at the time of his trial . . . have any information concerning the selection, drawing, organizing, and empaneling of the jury panel put upon him on his trial, but assumed that the jury was a legal jury." The affidavit of the attorney representing the defendant states in part: "Deponent further says that he did not know of the facts set out in the first and second grounds of the extra-

ordinary motion for new trial . . . before the trial and before the verdict in said case, and that the same could not have been discovered by him in the exercise of ordinary diligence." It has been held by this court that affidavits such as are attached to this motion and set out above are merely opinion, without sufficient facts being shown by which the court could judge whether due diligence had been exercised, and are not sufficient to support an extraordinary motion for new trial. Edge v. State, supra; Redding v. State, supra.

Furthermore, the facts and circumstances contradict the statements made in the affidavits. When the instant case came on for trial in Fulton Superior Court on March 10, 1953, the case
44 of Avery v. State, had been tried in the same county, and that case had been affirmed by this court on April 14, 1952, and was pending in the United States Supreme Court. See Avery v. State, 209 Ga. 116. The opinion of this court affirming the lower court in the Avery case sets out fully the methods and practices employed in the selection and empaneling of juries in Fulton County, including the practice of putting the names of white jurors on white slips of paper and the names of colored jurors on yellow slips of paper. Due diligence would certainly have required the defendant and his attorney to make themselves familiar with the opinions of this court on the question now raised. It follows that, for this reason, the motion for new trial was not sufficient as an extraordinary motion for new trial.

3. Defendant in his motion sets forth a practice which has been condemned by this court and the Supreme Court of the United States. However, any question to be considered by this court must be raised at the time and in the manner required under the rules of law and practice and procedure in effect in this State. We can not simply overlook the rules made for the purpose of providing a fair and orderly procedure in the conduct of trials and other legal processes in this State and permit the defendant to stand negligently or purposefully by, taking his chances of an acquittal, and then, upon his conviction, and upon the denial of a new trial which is affirmed by this court, be heard to say that the panel of jurors put upon him was not fairly and properly selected and empaneled. When this defendant failed to raise this question when the panel was put upon him, he waived the question once and for all.

It follows, there was no error in dismissing the extraordinary motion for new trial.

Judgment affirmed. All the Justices concur.

45-48 In Supreme Court of Georgia

AUBREY WILLIAMS

v.

THE STATE

JUDGMENT—May 10, 1954

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

49-52 In Supreme Court of Georgia

ORDER DENYING REHEARING—May 31, 1954

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

53 Supreme Court of the United States

October Term, 1954

No. 110 Misc.

[Title omitted]

On petition for writ of Certiorari to the Supreme Court of the State of Georgia.

ORDER ALLOWING CERTIORARI—October 18, 1954

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and the case is transferred to the appellate docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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